DISSENTING VIEWS

We strongly dissent from H.R. 2028, the so-called "Pledge Protection Act of 2003." The legislation is unconstitutional, unnecessary, and undermines our judiciary.

We do not oppose the legislation because we believe that voluntary recitation of the Pledge of Allegiance is unconstitutional. As a matter of fact, the House overwhelmingly passed a resolution stating that voluntary recitation of the Pledge of Allegiance is constitutional.[1] However, we do not believe that the appropriate reaction to the issue of the constitutionality of the Pledge of Allegiance is to undermine the whole of the federal judiciary, as the present bill does.

Ironically, the very idea of balkanizing our judiciary and eliminating the possibility of operating under a single uniform Supreme Court, as H.R. 2028 would do, is inconsistent with the very words of the Pledge of Allegiance, namely that we are "one Nation under God, indivisible, with liberty and justice for all." Dividing our nation into 50 different legal regimes, where the Pledge is permitted in some jurisdictions and not in others, is the very antithesis of this sacred principle. Enactment of such legislation would constitute a very undesirable precedent and would no doubt lead to further assaults on the judiciary.

The Pledge Protection Act, along with the Marriage Protection Act taken up by the House two months ago,[2] represents yet another effort by the Majority to use wedge social issues to divide our nation for political gain. Why else would the Majority schedule this legislation for floor action without the benefit of a single legislative hearing or subcommittee markup? Why else would the Majority bring up legislation deep in an election year when it has no chance of passage by the Senate?

If H.R. 2028 is passed into law, it would constitute the first and only time Congress has enacted legislation totally eliminating any federal court from considering the constitutionality of federal legislation—in this case, the Pledge of Allegiance. At a time when the highest court in our land has not issued a single opinion undermining the constitutionality of the Pledge, we believe it is inexcusable for Congress to attack the federal judiciary in an effort to score political points.

The operative language of H.R. 2028 consists of a single sentence. It amends the Federal judicial code to provide:

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[1] H. Res. 132, 108th Cong., 2d Sess. (2004). The resolution passed by a vote of 400–7, with 15 members voting "Present."

[2] H.R. 3313, the "Marriage Protection Act," precluded any federal judicial review, either by a lower federal court or the Supreme Court, of any constitutional challenge to DOMA's validity or the legislation itself. H.R. 3313, 108th Cong., 2d Sess. (2004). H.R. 3313 passed the House on July 22, 2004, by a vote of 233–194.

> [n]o court created by an Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance, as defined in section 4 of title 4, or its recitation.[3]

As such, the legislation effectively precludes any federal judicial review, either by a lower federal court or the Supreme Court, of any constitutional challenge to the Pledge of Allegiance, including challenges relating to religious and other forms of coercion. Instead, the bill relegates state courts to review any challenges to the Pledge, creating the very real possibility of having differing legal constructions across the 50 states. Even worse, the legislation precludes any and all residents of our Nation's capital and territories of the United States from bringing any claim concerning the Pledge of Allegiance.

It is ironic that in the very same year that Congress celebrated Justice John Marshall by authorizing a commemorative coin in his honor,[4] the Judiciary Committee would disparage him by passing legislation such as the Pledge Protection Act and the Marriage Protection Act that are totally inconsistent with Marshall's seminal legal opinion, *Marbury* v. *Madison*.[5] We should not use the issue of the constitutionality of the Pledge of Allegiance to permanently damage our courts, our constitution, and Congress. At a time when it is more important than ever that our nation stand out as a beacon of freedom, we cannot countenance a bill which undermines the very protector of those freedoms—our independent federal judiciary.

H.R. 2028 appears to be a response to the 9th Circuit's decision in *Newdow* v. *U.S. Congress*.[6] In that case, the 9th Circuit held that daily voluntary[7] recitation of the pledge violated the Establishment Clause of the Constitution.[8] In *Elk Grove Unified School*

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[3] 4 U.S.C. § 4 speaks to the manner and delivery of the Pledge of Allegiance. It reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all", should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

[4] John Marshall Commemorative Coin Act, H.R. 2768, 108th Cong. (2004). In support of the legislation, the bill's sponsor, Representative Spencer Bachus (R-AL), said, "John Marshall served as Chief Justice of the United States Supreme Court from 1801 to 1835, much of that time spent in this very building, holding the longest tenure of any Chief Justice in the Nation's history. He authored more than 500 opinions, including virtually all of the most important cases that the Court decided during his tenure. Under his leadership, the Supreme Court gave shape to the fundamental principles of the Constitution." 150 Cong. Rec. H5781 (July 14, 2004).

[5] *Marbury* v. *Madison*, 5 U.S. (1 Cr.) 137 (1803).

[6] 328 F. 3d 466 (CA9 2003).

[7] Mandatory recitation of the Pledge was struck down by the Supreme Court in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

[8] The Court wrote, "[t]he Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Newdow* at 469. The 9th Circuit, relying on the Supreme Court's voluntary school prayer jurisprudence stated, "the phrase 'one nation under God' in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and—since 1954—monotheism. The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under

Dist. v. *Newdow*, the Supreme Court, led by a 5–3 majority, reversed the decision in the 9th Circuit case, holding that Mr. Newdow lacked the proper standing to file his lawsuit on behalf of his elementary school aged daughter.[9] The only other Circuit to have considered the question, the 7th Circuit, has upheld the language of the Pledge, including the 1954 amendment.[10]

This unnecessary and dangerous legislation is strongly opposed by a variety of organizations, including the Leadership Conference on Civil Rights; the American Civil Liberties Union; People for the American Way; the Human Rights Campaign; Americans United for Separation of Church and State; American Jewish Committee; Anti-Defamation League; Baptist Joint Committee; National Council of Jewish Women; Union for Reform Judaism; U.S. Action; Human Rights Watch; the Unitarian Universalist Association; the Anti-Defamation League; the Interfaith Alliance; and the Constitution Project; among numerous others.[11]

For these and the other reasons set forth herein, we dissent from H.R. 2028.

I. H.R. 2028 IS UNCONSTITUTIONAL

H.R. 2028 is an unconstitutional and unnecessary court stripping bill that would eliminate access to the federal judiciary for a specific group of claims. For over 200 years, the federal courts have played an indispensable role in the interpretation and enforcement of the rights guaranteed under our constitution.

While it is clear that Congress has the authority to regulate federal court jurisdiction,[12] it is also clear that such power is not plenary. Rather, the power is subject to other overarching constitutional rights, such as freedom of speech, freedom of religion, equal protection and due process and separation of powers. In this regard, one of the preeminent treatises on Constitutional Law concludes:

> There is little doubt that other constitutional provisions, like the equal protection clause, limit Congress's power under the Exceptions Clause. For example, Congress could not constitutionally provide that Republicans, but no one else, may have access to the Supreme Court. Such a provi-

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Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion." Id. at 470.

[9] *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. XXX (2004).

[10] *Sherman* v. *Community Consolidated School District 21*, 980 F.2d 437 (7th Cir. 1992).

[11] See Letter to Representative F. James Sensenbrenner and Representative John Conyers, Jr. from Rev. Barry W. Lynn, Executive Director, Americans United for Separation of Church and State (September 14, 2004); Letter to Members of the Judiciary Committee from Kathryn A. Monroe, Director, The Constitution Project (September 15, 2004); Letter to Representative F. James Sensenbrenner and Representative John Conyers, Jr. from American Civil Liberties Union, American Humanist Association, American Jewish Committee, Americans for Religious Liberty, Americans United for Separation of Church and State, Anti-Defamation League, Baptist Joint Committee, Central Conference of American Rabbis, Committee for Judicial Independence, Human Rights Campaign, The Interfaith Alliance, Jewish Reconstructionist Federation, Leadership Conference on Civil Rights, National Council of Jewish Women, National Senior Citizen Law Center, People for the American Way, Union for Reform Judaism, Unitarian Universalist Association of Congregations, U.S. Action (September 14, 2004) [hereinafter Group Sign-On Letter].

[12] Article III of the Constitution authorizes Congress to establish judicial power in lower federal courts, and to regulate the Supreme Court's appellate jurisdiction.

> sion would violate the first amendment and thus would be *independently* unconstitutional.[13]

At the Committee's prior hearing on court stripping legislation concerning the Defense of Marriage Act, both of the constitutional scholars that testified agreed with this conclusion. The Minority witness, Professor Michael J. Gerhardt of William & Mary Law School, testified that "Congress cannot exercise any of its powers under the Constitution—not the power to regulate interstate commerce, not the Spending power, and not the authority to define federal jurisdiction—in a manner that violates the Constitution."[14] Similarly, the Majority's witness, Prof. Martin H. Redish of Northwestern University School of Law, acknowledged that there were limits on Congress' Article III powers:

> To be sure, several other guarantees contained in the Constitution—due process, separation of powers, and equal protection—may well impose limitations on the scope of congressional power. The Due Process Clause of the Fifth Amendment requires that a neutral, independent and competent judicial forum remain available in cases in which the liberty or property interests of an individual or entity are at stake. . . . The constitutional directive of equal protection restricts congressional power to employ its power to restrict jurisdiction in an unconstitutionally discriminatory manner.[15]

A. Separation of powers

The legislation intrudes upon the long-standing principle of separation of powers between the branches of government. By denying the Supreme Court its historical role as the final authority on the constitutionality of federal laws, H.R. 2028 unnecessarily and unconstitutionally usurps the Court's power. As a practical matter, to the extent that H.R. 2028 strips federal courts of jurisdiction to adjudicate claims that acts of Congress are unconstitutional, the legislation unnecessarily provokes an inter-branch confrontation. This is destructive of comity between branches and places undue tensions on the separation of powers framework of government.

Since the Supreme Court's historic ruling in *Marbury* v. *Madison,* the separation of powers doctrine has been well established. *Marbury* concerned the validity of a judicial commission that was signed, but not delivered prior to the end of John Adams' presidency. Justice Marshall agreed with President Jefferson that the commission should not be given effect, but he did so only by declaring unconstitutional the provision of the Judiciary Act of 1789 granting courts mandamus powers over these commissions. In so doing, the Court enunciated the principle of federal judicial review of federal laws. Marshall's opinion included the now famous dec-

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[13] Stone, Seidman, et al., Constitutional Law 85 (3d ed.) (emphasis added).

[14] Limiting Federal Court Jurisdiction to Protect Marriage for the States: Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 108th Cong., 2d Sess. (June 24, 2004) (testimony of Professor Michael Gerhardt) [hereinafter Federal Court Jurisdiction Hearing].

[15] Federal Court Jurisdiction Hearing (statement of Professor Martin Redish at 3–4).

laration that "it is emphatically the province and duty of the judicial department to say what the law is." [16]

In the more than 200 years that have passed since this legal decision was issued, judicial review has served as the very touchstone of our constitutional system and our democracy. As the Congressional Research Service's chief authority on separation of powers stated, "*Marbury* v. *Madison* is famous for the proposition that the [Supreme] Court is supreme on constitutional questions." [17]

Unfortunately, the concept of separation of powers and the independence of the judiciary are both being challenged by H.R. 2028. At the Committee's markup of this legislation, Rep. John N. Hostettler (R–IN) admitted that he disagreed with Marbury's long established principle of federal judicial review and explained that ". . . the notion of an independent judiciary is a flawed notion, at best" [18]

> Mr. HOSTETTLER: The notion of an independent judiciary . . . just does not bear out actually in the Constitution. But it does prove the adage that is long-time established that there is nothing so absurd, but if repeated often enough, people will believe it. And people have asserted the notion of an independent judiciary for so long and asked us as a country and as a citizenry to leave the Constitution alone . . . that many folks have begun to believe this absurd notion of an independent judiciary. . . .[19]

Historical precedent, the very bedrock and cornerstone of our judicial system, proves that it is in fact Representative Hostettler's argument that is flawed, at best. The failure of Congress to enact legislation totally eliminating federal judicial jurisdiction to review the constitutionality of federal statutes is evidence of the long deference and respect maintained by Congress for the principle of federal judicial review. In addition, several of the Supreme Court's own subsequent decisions reaffirm that Congress may not contravene the doctrine of judicial review.

Not too long after *Marbury,* the need for some federal judicial review in all cases was further confirmed by Justice Story in *Martin* v. *Hunter's Lessee,* when he wrote, "the whole judicial power of the United States should be, at all times, vested in an original or appellate form, in some courts created under its authority.[20] That is to say, a federal court ought to be empowered to exercise judicial power on behalf of the United States.

H.R. 2028 also contradicts existing precedent on Congress' ability to restrict the power of the judiciary. For example, in *United States* v. *Klein,*[21] the only case in which the Supreme Court addressed directly the question whether the Congress could impose a legislative restriction on court power if framed in jurisdictional terms, the Court made clear that "the language [of the challenged law] shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. . . . We believe that Congress has inad-

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[16] *Marbury* v. *Madison,* 5 U.S. (1 Cr.) at 178 (emphasis added).
[17] Louis Fisher, American Constitutional Law 42 (5th ed. 2003).
[18] H.R. 2028 Markup (Statement of Representative John Hostettler).
[19] Id.
[20] 14 U.S. (1Wheat.) 304 (1816).
[21] 80 U.S. 128, 178 (1872).

vertently passed the limit which separates the legislative from the judicial power."[22]

In an analogous vein, in *City of Boerne* v. *Flores,* the Court held that it is improper and unconstitutional for Congress to attempt to legislate its view of the free exercise clause of the First Amendment.[23] Also, in *Dickerson* v. *United States,* the Court struck down a federal statute narrowing the scope of statements held inadmissable under *Miranda* v. *Arizona,* 384 U.S. 436 (1966).[24] It is telling that as recently as this term, the Supreme Court rebuffed an attempt by the Executive Branch unilaterally to withdraw certain habeas corpus cases from the jurisdiction of the federal courts.[25]

Numerous esteemed legal scholars have emphasized that it would be a constitutional violation of separation of powers principles for Congress to completely strip federal courts of jurisdiction over constitutional claims. The most noted of these views was put forth by Stanford Law Professor Henry Hart when he concluded that under *Marbury,* restrictions on federal jurisdiction are unconstitutional when "they destroy the essential role of the Supreme Court in the constitutional system."[26] More recently, Yale Law Professor Akhil Amar concluded that article III requires that "all" cases arising under federal law must be vested, either as an original or appellate matter, in a federal court.[27]

The views of these legal scholars concerning complete federal court stripping are consistent with the findings of the Task Force of the Courts Initiative of the Constitution Project, a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues. The Constitution Project concluded "legislation precluding court jurisdiction that prevents the judiciary from invalidating unconstitutional laws is impermissible. Neither Congress nor state legislatures may use their powers to prevent courts from performing their essential functions of upholding the Constitution."[28]

Other independent and respected legal experts have reached the same conclusion. For example, the Washington, D.C. law firm of Covington & Burling found that, "H.R. 2028 would violate the Constitution, place congress above the Federal judiciary, and set a dangerous precedent."[29] Specifically, they found that not only will this bill violate the First Amendment by closing the federal courts to claims that the Pledge is unconstitutional,[30] thereby abridging the

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[22] 80 U.S. at 145.

[23] 521 U.S. 507 (1997).

[24] 530 U.S. 428, 432 (2000) ("Congress enacted 18 U.S.C. 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda,* being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves.").

[25] *Rasu* v. *Bush,* 542 U.S. _____ (2004); *Hamdi* v. *Rumsfeld,* 542 U.S. _____ (2004); *Rumsfeld* v. *Padilla,* 542 U.S. _____ (2004).

[26] Henry Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv L. Rev. 1362 (1953).

[27] Akhil Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 Boston Univ. L. Rev. 205 (1985).

[28] Report of the Citizens for Independent Courts Task Force on the Role of the Legislature in Setting the Power and Jurisdiction of the Courts, reprinted in: The Century Foundation, Uncertain Justice: Politics in America's Courts 206, 217 (2002).

[29] Memorandum from David H. Remes, Partner, Covington & Burling, prepared at the request of People for the American Way (September 17, 2004).

[30] Id. at 3.

right to petition, but the bill will also repudiate the principle of separation of powers by placing an action by Congress beyond federal court review.[31]

B. Freedom of speech and establishment

If H.R. 2028 is passed into law, it would totally eliminate any federal court from considering any claim that any aspect of any governmental entity's use or application—whether coerced or otherwise—of the Pledge of Allegiance violates the First Amendment or any other constitutional limitation.

Given the importance of developing a single national standard on constitutional questions it seems particularly odd that the Majority would seek to strip federal courts of their power in the context of the Pledge. As Americans United for the Separation of Church and State and other non-profit advocacy groups noted in their letter to members of the Judiciary Committee:

> H.R. 2028 would undermine the longstanding constitutional rights of religious minorities to seek redress in the federal courts in cases involving mandatory recitation of the Pledge. As a result, this legislation will seriously harm religious minorities and the constitutional free speech rights of countless individuals. . . . Americans United strongly urges [Congress] to protect longstanding constitutional rights of religious minorities to seek redress in the federal courts, and respect free speech rights of countless individuals by rejecting this misguided legislation.[32]

An additional concern is that the legislation operates to deny federal court review involving religious coercion in violation of the First Amendment. Such a case was present over sixty years ago in *West Virginia State Board of Education* v. *Barnett*[33] when the Supreme Court struck down a West Virginia law that mandated schoolchildren to recite the Pledge of Allegiance. Under the West Virginia law, religious minorities faced expulsion from school and could be subject to prosecution and fined, if convicted of violating the statute's provisions. In striking down that statute, Justice Jackson wrote for the Court:

> To believe patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds . . . If there is any fixed star in our constitutional constellation, it is that no official, high, or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.[34]

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[31] Id. at 5.

[32] Group Sign-On Letter. It is particularly puzzling that the Majority is so intent on undermining federal judicial power with respect to constitutional law interpretations, while in other contexts it seeks to expand federal judicial power at the expense of state courts over matters such as state class action claims, state drug laws, and state abortion laws.

[33] 319 U.S. 624, 638 (1943).

[34] Id. at 639–640.

Had H.R. 2028 been law, the Supreme Court would have never been able to issue this landmark ruling protecting religious liberty.

Moreover, just recently, a panel of the U.S. Court of Appeals for the Third Circuit held that a Pennsylvania law mandating recitation of the Pledge, even when it provided a religious exception, violated the Constitution because it violated the free speech of the students.[35] In *Circle School* v. *Pappert,* the court found that:

> It may be useful to note our belief that most citizens of the United States willingly recite the Pledge of Allegiance and proudly sing the national anthem. But the rights embodied in the Constitution, particularly the First Amendment, protect the minority—those persons who march to their own drummers. It is they who need the protection afforded by the Constitution and it is the responsibility of federal judges to ensure that protection.[36]

Again, under H.R. 2028, such a coercive speech case could never reach the federal courts.

It is also important to note that as H.R. 2028 is drafted, it insulates the Pledge of Allegiance as set forth in section 4 of title 4 of the United States Code from constitutional challenge in the federal courts. However, the statute and the Pledge are subject to change by future legislative bodies. This means that were some future Congress to insert in the pledge some objectionable language, concerning overt discrimination or favoring one specific religious text, that would be immune to constitutional challenge in the federal courts.

C. Equal protection and due process

H.R. 2028 would also violate the Fifth Amendment's guarantee of equal protection under the law,[37] in that it imposes an undue burden on a specific class of individuals without a rational basis. The critical case in this regard is *Roemer* v. *Evans,* a 1996 Supreme Court decision invalidating a Colorado law preventing the state or any political subdivision from enacting legislation to protect gay and lesbian citizens from discrimination.[38]

Roemer held in a 6 to 3 decision by Justice Kennedy that it was unacceptable for the state of Colorado to exclude a class of individuals from legal protections:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.[39]

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[35] *Circle School* v. *Pappert,* No. 03–3285 (3rd Cir., Aug. 19, 2004).
[36] Id. Slip Op. at 14.
[37] The Fifth Amendment Due Process has long been interpreted to include a requirement of equal protection parallel to the requirement of the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Adarand Contractors, Inc.* v. *Pena,* 515 U.S. 200 (1995).
[38] 517 U.S. 620 (1996).
[39] *Id.* at 633.

Absent a rational basis, the *Roemer* Court found that laws of this nature cannot stand. It found that such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[40] In *Roemer,* the general provision "that gays and lesbians shall not have any particular protection from the law, inflicts on them immediate, continuing and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[41] Specifically, the Court found the principal motivation for the legislation was animus towards gays and lesbians, which had no rational relationship to a legitimate governmental purpose; it concluded, "a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[42]

These same concerns could well invalidate H.R. 2028 on Equal Protection grounds, since it could be seen as specifically affecting religious minority groups and atheists. Even if courts were to apply the more deferential rational basis standard of review to the legislative proposal, it could be struck down. Though, generally, courts will not look into the motive of the legislature to determine the constitutionality of a statute, animus towards a particular class will be considered as improper and discriminatory, and the statute will not withstand scrutiny.[43] As Professor Gerhardt observed that, "distrust of 'unelected judges' does not qualify as a legitimate basis, much less a compelling justification, for congressional action."[44]

It is also possible that the courts will find that H.R. 2028 violates the Fifth Amendment's Due Process clause. As Professor Gerhardt noted in a Committee hearing on the Marriage Protection Act, "a proposal excluding all federal jurisdiction may violate the Fifth Amendment's Due Process Clause's guarantee of procedural fairness."[45] This is because on its face the law denies federal courts the opportunity to review a federal law. Given the traditional expertise the federal courts have in reviewing the constitutionality of federal laws, relegating such claims to state court can hardly be considered a fair or rationale process.

D. Particular problem with regard to District of Columbia and U.S. territories

Another problem with the legislation is that it denies any access to any courts concerning Pledge of Allegiance cases in the District of Columbia and U.S. territories. The only possible rationale the Majority can assert for the legislation's constitutionality is that it does not totally preclude judicial review by state courts. While we do not believe the text or history of the Constitution, or subsequent action by the courts or Congress support the validity of such a contention, even that thin rationale does not apply with respect to cases involving the Pledge of Allegiance brought in the District of Columbia or U.S. territories.

As Representative Robert C. Scott (D–VA) observed at the Committee's markup:

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[40] *Id.*
[41] *Id.*
[42] *Id.* (citing *Dep't of Agric.* v. *Moreno,* 143 U.S. 528, 534 (1973)).
[43] See *Romer* v. *Evans,* 517 U.S. 620 (1996).
[44] *Federal Court Jurisdiction Hearing* (statement of Professor Gerhardt at 2).
[45] *Id.* at 10.

> Mr. SCOTT. Mr. Chairman, the way I read the bill, there is an additional gratuitous insult for the residents of Washington, DC, in that apparently they will be totally left out without any court to file in. Yesterday we helped foreign corporations escape liability from American courts by developing a scheme whereby there may be no court that someone may file in within the United States. This bill, I think, does the same for Washington, DC residents, because . . . there is no court in D.C. that you could bring the case in.[46]

Mr. Scott's concern stems from the fact that the local courts in the District of Columbia,[47] the U.S. Virgin Islands,[48] the Northern Mariana Islands,[49] and Guam,[50] were all created by acts of Congress, not the local legislatures. Since the legislation provides that "[n]o court created by an Act of Congress" shall have any jurisdiction to hear cases concerning the constitutionality of the Pledge of Allegiance, the net result is that under H.R. 2028, no judicial review would be available for Pledge of Allegiance cases for the nearly 600,000 residents of the District, not to mention the residents of these other territories. As the Majority's own witness, Martin Redish, asserted at the Committee's hearing on court stripping in the context of the Defense of Marriage Act:

> . . . as long as the state courts remain available and adequate forums to adjudicate federal law and protect federal rights, it is difficult to see how the Due Process Clause would restrict congressional power to exclude federal judicial authority to adjudicate a category of cases, even one that is substantively based.[51]

Clearly, such a state court review is not possible in the District of Columbia and U.S. territories as H.R. 2028 is drafted, so the bill would be unconstitutional under the interpretation of the Majority's own witness.

II. H.R. 2028 UNDERMINES THE INDEPENDENCE OF THE FEDERAL JUDICIARY

Aside from the obvious constitutional flaws inherent in H.R. 2028, the idea of Congress unilaterally cutting off federal constitutional review constitutes both a poor and dangerous legal precedent. The legislation not only degrades the independence of the federal judiciary, but eliminates any possibility of developing a single uniform policy with regard to the recitation of the Pledge from the 50 state supreme courts.

Since H.R. 2028 strips the federal courts of the ability to review state court decisions, including those involving federal questions, a lack of uniformity in the law is an imminent threat. One's federal rights would depend on the vagaries of location. Ultimately, coerc-

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[46] *Markup of H.R. 2028* (statement of Representative Robert Scott).
[47] Pub. L. No. 93–198, § 431(a), 87 Stat. 774, 792–93 (1973).
[48] 48 U.S.C. § 1611.
[49] 48 U.S.C. § 1821.
[50] 48 U.S.C. § 1424.
[51] See *supra* note 15.

ing children to recite the Pledge may be permitted in one state and not in another.

This will create the sort of problem that the seminal decision in *Martin* v. *Hunter's Lessee* anticipated and sought to avoid.[52] (In *Martin,* the Court held a state law unconstitutional for the first time, noting that it would be undesirable for the U.S. Constitution to mean one thing in one state and something altogether different in another state.) Were states the final arbiters of federal constitutional questions, the country would be rendered a patchwork of inconsistent interpretations. Constitutional protections could be strong in one state, and weak or nonexistent in another. Minorities in one state could be disenfranchised from the federal protections and benefits afforded citizens of another state, prompting class holders of rights to cluster upon jurisdictional lines.

Both of the legal scholars who testified earlier this year at the Committee's hearings on Congressional power to control federal court jurisdiction with respect to the Defense of Marriage Act agreed that such legislation in general was inadvisable from a policy perspective. Professor Gerhardt testified that "a proposal excluding all federal jurisdiction regarding a particular federal question undermines the Supreme Court's ability to ensure the uniformity of federal law. . . . This allows for the possibility that different state courts will construe the law differently, and no review in a higher tribunal is possible."[53]

The Majority's witness, Professor Martin Redish, was even more blunt in criticizing the legislation:

> as a matter of policy . . . I . . . firmly believe that were Congress to [strip federal courts of jurisdiction in DOMA cases, it] would risk undermining public faith in both Congress and the federal courts. Due to their constitutionally granted independence and insulation from the majoritarian branches of the federal government, the judiciary possesses a unique ability to provide legitimacy to governmental action in the eyes of the populace. Congressional manipulation of federal judicial authority therefore threatens the legitimacy of federal political actions.[54]

Such a complete, unprecedented, and unnecessary stripping of federal court jurisdiction would be totally at odds with the policy of checks and balances envisioned by the Nation's founders. This legislation would bring us far closer to the balkanized scenario envisioned by the Articles of Confederation, than the unified nation brought forth by the Constitution. Contemporaneous writings by two of the Nation's most important founding fathers—the principal drafter of the Constitution and Bill of Rights, James Madison, as well as the author of the Federalist Papers, Alexander Hamilton—indicate the importance they placed on a strong and independent federal judiciary.

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[52] See *supra*, note 14. Affirming the Supreme Court's ability to review matters of state common law, statutory law, and constitutional law to effectuate national uniformity of law under the Federal Constitution.

[53] See supra, note 15.

[54] Id. (written statement of Martin Redish).

Thus, when there was disagreement at the constitutional convention regarding the need for lower federal courts, Madison insisted on provisions permitting their creation. He argued, confidence "cannot be put in the state tribunals as guardians of the national authority and interests."[55] Similarly, when he introduced the Bill of Rights in the First Congress, Madison again emphasized the importance of federal courts:

> [I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[56]

Alexander Hamilton also wrote about the importance of federal court jurisdiction. In Federalist Number 78, Hamilton emphasized the importance of an independent federal judiciary: "In a monarchy it is an excellent barrier to the despotism of the prince; in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body."[57] In Federalist Number 81, Hamilton expressed further support for federal courts being the appropriate venue for federal issues, writing:

> But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning cannot foresee how far the prevalency [sic] of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union.[58]

The legal precedent that will be set if Congress is permitted to simply "end run" the Bill of Rights by circumventing the federal courts could be far-reaching and is adopted here. If this bill passes, we must ask, as we did with the Marriage Protection Act, what other rights will next be placed at risk? The right to vote? The right to privacy? Indeed, many of these proposals are already introduced in statutory form.[59] If H.R. 2028 passes into law, it truly could be open season on our precious rights and liberties.

This was our prediction when the Majority was contemplating the Marriage Protection Act, and here we are again. In fact, in his letter to Members of the U.S. House of Representatives, Representative John Dingell (D–MI) warned of the potential slippery slope that Congress may end up on as a result of passing such problematic legislation:

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[55] 2 Max Farrand, the Records of the Federal Convention of 1787 27 (1937).
[56] 1 Annals of Cong. 458 (Gales & Seaton ed.) (June 8, 1789).
[57] The Federalist No. 78 (Alexander Hamilton).
[58] Id. No. 81 (Alexander Hamilton).
[59] See, e.g., H.R. 3893 (regarding government exercise of religion, sexual orientation, and the right to marry); H.R. 3190 (regarding government exercise of religion); H.R. 3799 (regarding official acknowledgments of religious authority); and H.R. 2045 (regarding government recognition of the Ten Commandments).

> Once Congress goes down the path of making any statute immune from constitutional challenge in the Supreme Court, there will be no turning back. If the Marriage Protection Act is not rejected, we should expect to see this dangerous approach repeated on a wide range of other legislation including bills infringing upon the right to bear arms.[60]

In a similar vein, Bob Barr, a former Republican congressman, noted that this type of bill sets a dangerous precedent because court stripping provisions could be added to legislation limiting the right to bear arms under the Second Amendment, an idea many conservatives would oppose.[61]

Astoundingly, during the Committee markup of the Pledge Protection Act, Rep. Steve Chabot (R–OH) conceded that there is no telling where the Majority will stop in its quest to strip us of our rights and liberties:

> Mr. NADLER. One of the reasons we have a Supreme Court is we have a uniform interpretation of the Constitution, and then your constitutional rights don't depend on what State you are in; they are guaranteed by the Bill of Rights, by the Constitution, and they are the same wherever you are. Your rights under the Federal Constitution should not depend on what State you are in. This would essentially reverse the Civil War. What you are saying is you would have 50 different countries, not one country.
>
> Mr. CHABOT. We are only saying that with respect to one thing, and that is the Pledge of Allegiance.
>
> Mr. NADLER. With all due respect, if this bill passes, you will be saying that with respect to two things so far, since this is the second bill——
>
> Mr. CHABOT. So far.
>
> Mr. NADLER. Exactly. That is the point. So far. What are we really saying here . . . is that whenever there is a law that the majority likes that it fears may be declared unconstitutional by the Supreme Court we will have a court-stripping bill . . . and we will end up where you have no uniform Constitution and no uniform Federal law, and the 50 States start going their separate ways.[62]

Moreover, if court stripping had been used in the past, the Court might never have overturned laws prohibiting inter-racial marriage[63] or permitting segregated education.[64]

The views of many legal scholars concerning complete federal court stripping are consistent with the findings of the Task Force of the Courts Initiative of the Constitution Project, which concluded, "legislation precluding court jurisdiction that prevents the judiciary from invalidating unconstitutional laws is impermissible. Neither Congress nor state legislatures may use their powers to

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[60] Letter from John D. Dingell to U.S. Representatives (July 22, 2004).
[61] Letter from Bob Barr to U.S. Representatives (July 19, 2004).
[62] Markup of H.R. 2028.
[63] *Loving* v. *Virginia,* 388 U.S. 1 (1967).
[64] *Brown* v. *Board of Educ.,* 347 U.S. 483 (1954).

prevent courts from performing their essential functions of upholding the Constitution."[65]

When court stripping legislation was proposed in the 1970's concerning school prayer, abortion, and busing, it is no wonder that principled conservatives such as former Senator Barry Goldwater, former Yale Law professor Robert Bork, and former Attorney General William French Smith, among many others, found court stripping legislation to be so repugnant.

Senator Goldwater opposed the proposed court-stripping measures, warning that the "frontal assault on the independence of the Federal courts is a dangerous blow to the foundations of a free society."[66] Then, in 1985, Sen. Goldwater expressed his concern over legislation that would have stripped the Supreme Court of jurisdiction on school prayer cases:

I am a little surprised that the Senator from North Carolina decided to outlaw the Supreme Court from our life. I think it is unconstitutional. The Senator is beginning to get into areas now that are frankly none of our business . . . I am really kind of surprised that he would write this bill. If I wrote it, I would have been ashamed of it.[67]

Robert Bork, a former Yale Law professor and Reagan appointee for the D.C. Circuit Court of Appeals, also expressed his concern over such court-stripping measures, arguing, "[y]ou'd have 50 different constitutions running around out there, and I'm not sure even the conservatives would like the results."[68]

Moreover, in his letter to Senate Judiciary Chairman Strom Thurmond regarding S. 1742, a bill that would have stripped the Supreme Court and lower federal courts of jurisdiction over school prayer cases, then Attorney General William French Smith argued that, "[c]ongress may not . . . consistent with the Constitution, make 'exceptions' to Supreme Court Jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers."[69]

Efforts by the Majority to discredit our judiciary by painting it with the broad brush of "judicial activism" are both disingenuous and demeaning. Once we parse through the thick rhetorical fog surrounding this issue, it becomes clear that the Majority's real gripe is with the results, not the activist nature, of judicial decisions. As Roger Pilon, a Cato Institute Director, acknowledged, "examples of 'judicial activism' that are cited, turn out, when examined more closely, not to be cases in which the judge failed to apply the law but applied the law differently, or applied different law, to reach a result different than the result thought correct by the person charging activism."[70]

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[65] Report of the Citizens for Independent Courts Task Force on the Role of the Legislature in Setting the Power and Jurisdiction of the Courts, reprinted in: The Century Foundation, Uncertain Justice: Politics in America's Courts 206, 217 (2002).

[66] See Linda Greenhouse, The Nation: How Congress Curtailed the Courts' Jurisdiction, N.Y. TIMES, Oct. 27, 1996, 4 at 5.

[67] Cong. Rec., Sept. 10, 1985.

[68] Quoted in Frank Trippet, Trying to Trim the Courts, Time, September 28, 1981.

[69] Letter from William French Smith, Attorney General of the United States, to the Honorable Strom Thurmond, Chairman, U.S. Senate Comm. on the Judiciary (May 6, 1982), reprinted in 128 Cong. Rec. 9093, 9097 (May 6, 1982).

[70] Hearing on H.R. 1252, The Judicial Reform Act of 1997 and Federal Judicial Term Limits Before the Subcomm. on Courts and Intellectual Property of the House Comm. On the Judiciary,

So-called "conservatives" are prone to assert that Supreme Court decisions protecting a woman's right to choose (*Roe* v. *Wade*[71]) and a child's right to attend school without being subject to compulsory prayer (*Engel* v. *Vitale*[72]) constitute judicial activism. They herald, however, as landmark examples of the Court restraining excessive legislative power those decisions that limit Congress's ability to provide affirmative action as a remedy to respond to racial discrimination (*Adarand* v. *Pena*[73]), ban guns in schools (*United States* v. *Lopez*[74]), require background checks before felons can purchase handguns (*Printz* v. *United States*[75]), and limit campaign expenditures (*Buckley* v. *Valeo*[76]).

Similarly, when a Bush I-appointed district judge enjoins an Oregon ballot initiative allowing for assisted suicide,[77] or a Reagan-appointed district judge dismisses a contempt order for violating the Freedom of Access to Clinic Entrances Act because the defendants lack the requisite "wilfulness" on account of their religious convictions,[78] we hear scant criticism from the right wing. But when federal courts in California have the temerity to suggest that referenda that deny alien children the right to an education[79] or prevent minorities subject to discrimination from benefitting from affirmative action may be illegal or inappropriate,[80] we hear storms of protest from the same conservatives.

III. H.R. 2028 IS UNPRECEDENTED

The fact that no other Congress has passed a law that totally eliminates the federal courts' ability to review the constitutionality of a federal law should give all of the Members pause when considering this legislation.

This empirical assessment was most recently reviewed and confirmed by Georgetown University Law Center Professor Mark Tushnet, who explained that:

> [T]he very fact that *Congress has never attempted to bar access to all federal courts when a person claims that a federal statute violates the Constitution* is itself a matter of more than minor significance.[81]

The Majority attempts in vain to find precedent for court-stripping bills such as H.R. 2028 and H.R. 3313, but at the end of the day, they are left with the reality that no bill as far reaching and

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105th Cong. (1997) (written statement of Roger Pilon, Director, Center for Constitutional Studies, Cato Institute).

[71] 410 U.S. 113 (1973).

[72] 370 U.S. 421 (1962).

[73] 515 U.S. 200 (1995).

[74] 514 U.S. 549 (1995).

[75] 521 U.S. 898 (1997).

[76] 424 U.S. 1 (1976).

[77] *Lee* v. *Oregon*, Civil No. 94–6467–HO, 2 (D. Or. 1994).

[78] *United States* v. *Moscinski*, 952 F. Supp. 167, 170 (S.D.N.Y. 1997).

[79] *League of United Latin Americans Citizens* v. *Wilson*, 908 F. Supp. 755 (C.D. CA, 1995), remanded 131 F.3d 1297 (1997), aff'd 1998 U.S. Dist. Lexis 3418 (March 13, 1998) (holding California Proposition 187 unconstitutional).

[80] *Coalition for Economic Equity* v. *Wilson*, 946 F. Supp. 1480, rev'd 122 F.3d 718 (1997) (holding California Proposition 209).

[81] Letter from Mark Tushnet, Professor, Georgetown University Law Center, to the Honorable John Conyers, Jr., 2 (July 19, 2004) (some emphasis in original and emphasis added) [hereinafter Tushnet Letter].

degrading to the federal judiciary as these, has never been enacted into law.

The Majority attempts to justify such legislation through several short-sighted appeals. First, it asserts that total court stripping laws are supported by precedent enacted by the Congress. Second, they argue that such court stripping laws were envisioned by the founders. Neither of these assertions is correct.

The Majority then points to several laws they believe to be precedents for H.R. 3313 and H.R. 2028. As the following review indicates, in addition to being largely outdated, all of the precedents they cite are either misstated, constitute only partial restrictions on federal judicial review, or do not involve issues of constitutional review:

Judiciary Act of 1789:[82] The Majority cites as precedent the fact that the Judiciary Act of 1789 did not permit the Supreme Court (or any other federal court) to review state supreme court decisions upholding constitutional challenges to federal laws.[83] In relying on information given to them by the Congressional Research Service, the Majority argues that the interrelated effects of two sections of that Act, "operate to deny under some circumstances the authority of any federal court to review the constitutionality of some federal laws."[84] (It is notable that this is the only single law that CRS found even remotely close to serving as a precedent for the Marriage Protection Act and the Pledge Protection Act—a more than 210 year old law, whose applicable provision had since been long repealed).

However, as Professor Tushnet points out, this does not prove the Majority's contention that federal judicial review can be ignored: "The underlying thought [at that time] was that the national interest was in ensuring that federal rights were adequately protected, and that interest was not impaired when a state court mistakenly over-protected federal rights. After a controversial decision in the early decades of the twentieth century, Congress came to the view that there was indeed a national interest in ensuring the uniformity in the interpretation of national law, and amended the statute regarding the Supreme Court's jurisdiction accordingly."[85]

The fact that the only precedent in the history of the law of this country that the Majority is able to cite in support of their argument is both questionable and obscure, at best, speaks for itself. In any event, it is a far different thing to prevent individuals from having access to the federal courts in order to redeem their constitutional rights than it is to prevent states from appealing legal judgments that they lose against the federal government in their own state courts.

Cary v. *Curtis:*[86] The Majority also attempts to argue that a 19th century federal statute placing jurisdiction for all claims of illegally charged customs duties with the Secretary of the Treasury rep-

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[82] Act of Sept. 24, 1789, ch. 20, §§ 11, 12, 1 Stat. 73 (1789).
[83] H.R. 2028 Markup (statement of Representative Sensenbrenner).
[84] Memorandum from Johnny H. Killian, Senior Specialist, Congressional Research Serv., to Perry Apelbaum, Minority Chief Counsel, U.S. House Comm. on the Judiciary (August 16, 2004).
[85] Tushnet Letter at 1 n.2 (referring to *Ives* v. *South Buffalo Railway Co.,* 94 N.E. 431 (N.Y. 1911) and *New York Cent. R. Co.* v. *White,* 243 U.S. 188 (1917)).
[86] *Cary* v. *Curtis*, 44 U.S. 236 (1845) (reviewing Act of 1839, ch. 82, 2).

resents a precedent for federal court stripping. In upholding the statute, the Court stated that, under the statute, "it is the Secretary of the Treasury alone in whom the rights of the government and of the claimant are to be tested."[87] The Majority, however, misstates the decision.

In fact, the Court decided the case on the basis of sovereign immunity, not court stripping. The plaintiff was suing the government to recover allegedly improperly charged customs fees. The Court stated that: "the government, as a general rule, claims an exemption from being sued in its own courts. That although, as being charged with the administration of the laws, it will resort to those courts as means of securing this great end, it will not permit itself to be impleaded therein, save in instances forming conceded and express exceptions."[88] Thus, the language alluded to by the Majority regarding jurisdiction is mere dicta, and is not controlling. Additionally, *Cary* is distinguishable as a suit against the government for money, not a suit asserting that the law at issue violates an individual constitutional right.

Ex parte *McCardle:* The *McCardle*[89] case is often cited for authority that the Congress may upset a pending Supreme Court appeal by limiting the Court's appellate jurisdiction. The case involved a habeas corpus petition by an individual who had been convicted by a military commission for acts obstructing the Reconstruction. In an effort to forestall an anticipated adverse ruling, Congress eliminated the Supreme Court's appellate jurisdiction to hear the case. The Court held "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."[90] However, all that is clear from this case is that Congressional power under the exceptions clause is not without some limits.

The scope of the *McCardle* decision was narrowed when, in *Ex Parte Yerger*,[91] which was also a challenge to the Reconstruction Act, the Court affirmed its jurisdiction to review habeas corpus decisions from lower federal courts when the petitions were originally brought under earlier legislation.[92] In light of *Yerger*, one commentator notes that the Court's concession of appellate jurisdiction in *McCardle* was, as a practical matter, quite minimal:

> The statute [involved in *McCardle* did] not deprive the Court of jurisdiction to decide McCardle's case; he could still petition the Supreme Court for [an original] writ of habeas corpus. [The] legislation did no more than eliminate one procedure for Supreme Court review of the decisions denying habeas corpus while leaving another equally efficacious one available.[93]

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[87] Id. at 241.
[88] Id. at 245.
[89] 74 U.S. (7 Wall.) 506 (1869).
[90] Id. at 514.
[91] 75 U.S. (7 Wall.) 85 (1869).
[92] Id.
[93] Leonard Ratner, Congressional Power Over the Appellate Jurisdiction of the Supreme Court, 109 U.Pa.L.Rev., 157, 180 (1981).

The Court's decision in *Yerger* shows that the Justices are protective of the Court's jurisdiction and will not readily concede its appellate jurisdiction. In *McCardle*, the Court surrendered only a single procedural avenue for appellate review, not the ability to hear an entire class of cases. Moreover, *McCardle*, as a war powers case, must be considered within the Civil War context from which it arose.

The Francis Wright:[94] the Majority also points to another 19th century federal law restricting Supreme Court jurisdiction in admiralty cases to questions of law arising on the record.[95] The Court upheld the statute in *The Francis Wright* decision.

This case, however, in no way indicates that Congress may take a particular class of cases out of the Jurisdiction of all federal courts.[96] It merely deals with the uncontroversial claim that in cases involving admiralty jurisdiction, Congress may limit the appellate jurisdiction of the Supreme Court.[97]

Marathon Pipe Line:[98] the Majority also points to dicta from Justice Brennan's opinion in the Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.* to the effect that matters that could be heard in Article III courts could also be heard in state courts.[99]

In point of fact, the actual holding in *Marathon Pipe Line* was that Congress, had invested unconstitutionally broad powers in the untenured judges who served in the newly created bankruptcy courts. The Supreme Court invalidated the entire statutory grant of jurisdiction to the new bankruptcy court system set up by the 1978 Act, holding that untenured judges could not, consistent with Article III, exercise the judicial power of the United States. Even in the dicta cited by the Majority, Justice Brennan was endorsing the possible constitutionality of partial restrictions on judicial review, rather than a complete bar on such review.[100] If anything, the *Marathon Pipe Line* decision stands for the sanctity of the federal judiciary, and the fact that Congress cannot easily give federal matters to judges who are not actual Article III judges appointed by the president and confirmed by the Senate.

The Johnson Act:[101] This act "deprived federal district courts of jurisdiction to enjoin enforcement of certain state administrative orders affecting public utility rates where 'A plain, speedy and efficient remedy may be had in the courts of such State,'"[102] and "the jurisdiction of the federal court was based solely on diversity."[103] "The legislative history of the Johnson Act . . . makes clear that its purpose was to prevent public utilities from going to federal district court to challenge state administrative orders or avoid state administrative and judicial proceedings."[104]

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[94] The Francis Wright, 105 U.S. 381 (1881) (analyzing Act of Feb. 16, 1875, ch. 77).
[95] See Federal Court Jurisdiction Hearing (statement of Phyllis Schlafly).
[96] The Francis Wright, 105 U.S. at 381.
[97] Id.
[98] *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).
[99] See Federal Court Jurisdiction Hearing (statement of Phyllis Schlafly).
[100] *Marathon Pipe Line Co.*, 458 U.S. at 50.
[101] 28 U.S.C. §1342.
[102] *Ala. Pub. Serv. Comm'n* v. *Southern Ry. Co.*, 341 U.S. 341, 350 (1951).
[103] *Rosewell* v. *LaSalle Nat'l Bank*, 450 U.S. 503, 534 (1981).
[104] *California* v. *Grace Brethren Church*, 457 U.S. 393, 410 (1982).

The Act did not purport to prevent the Supreme Court from reviewing state-court rate order decisions, or to preclude a challenge to the constitutionality of the Act itself.

Daschle Brush Clearing Rider:[105] Most notably, the Majority claims that a rider to the 2002 Supplemental Appropriations Act authored by Senator Tom Daschle (D–SD) approving logging and clearance measures by the Forest Service in the Black Hills of South Dakota serves as a precedent for the enactment of these types of court-stripping measures.[106]

The problem with this argument is that, while the rider restricted "judicial review" of "any [logging or clearance] action"[107] by the Forest Service, it did not restrict federal judicial review of the rider itself or its constitutionality. Indeed, the federal courts did review the validity of the rider,[108] and explicitly found that the "challenged legislation's jurisdictional bar did not apply to preclude Court of Appeals' review as to the legislation's validity."[109]

Other federal statutes cited by the Majority involve only partial limitations on federal court jurisdiction or do not implicate constitutional issues as H.R. 2028 does. These include the Norris-LaGuardia Act of 1932 (federal court actually found to have jurisdiction);[110] the Emergency Price Control Act of 1942 (appeals permitted to Supreme Court);[111] the Portal-to-Portal Pay Act of 1947 (deals with a restriction on liability, not a constitutional claim);[112] the 1965 Medicare Act (court stripping limited to administrative determination regarding fee schedule, not constitutional issues);[113]

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[105] Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Acts on the United States, Pub. L. No. 107–206, § 706, 116 Stat. 820, 864 (2002) [hereinafter 706 Rider].

[106] See H.R. 3313 Markup (statement of Representative Sensenbrenner).

[107] 706 Rider § 706(j). It must be noted that the express language of this bill is far broader than the language in the Daschle amendment. While the Daschle amendment precluded "judicial review" of any logging or clearance action, this bill would strip the federal courts of "jurisdiction" or "appellate jurisdiction . . . to hear or determine any question pertaining to" DOMA.

[108] *Biodiversity Associates* v. *Cables*, 357 F.3d 1152 (10th Cir. 2004).

[109] Id. at 1152. Furthermore, in that case, the Tenth Circuit Court of Appeals explicitly held that the legislation's restriction on judicial review was not absolute because it did not apply to the review of the "congressional act," but rather to review of "the Forest Service's acts authorized by the Rider." Id. at 1160. Notably, the court also held that Congress, in this instance, was acting pursuant to an express authorization under Article IV, § 3, cl. 2, to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Id. at 1156.

[110] Although characterized in Ms. Schlafly's testimony as having "removed from federal courts the jurisdiction [in cases involving labor strikes] from the federal courts, and the Supreme Court had no difficulty in upholding it," Federal Court Jurisdiction Hearing (statement of Ms. Schlafly), the Norris-LaGuardia Act did nothing of the sort. As the Supreme Court observed in *Lauf* v. *E.G. Shinner*, 303 U.S. 323 (1938), the District Court had jurisdiction to hear the case "by the findings as to diversity of citizenship and the amount in controversy."

[111] This legislation also did not strip the federal courts, or the Supreme Court, of equity jurisdiction to hear cases involving price orders. Section 204(a) of the Act allowed an individual whose protest against a price control ruling had been denied at the administrative level, to take an appeal to an Emergency Court of Appeals set up by subsection (c), and take a direct appeal to the U.S. Supreme Court under subsections (b) and (d).

[112] The section in question states only that "No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding . . . to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section." It is, at best, tautological to state that a court does not have jurisdiction to impose liability on an employer with respect to an activity that is not compensable.

[113] The section Ms. Schlafly cites, 42 U.S.C. § 1395w–4(i)(1), does not permit judicial or administrative review of certain factors to be taken into account in the setting of a fee schedule for the payment of physicians under the Supplementary Medical Insurance Benefits for Aged and

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the Voting Rights Act of 1965 (funnels cases into the district court for the District of Columbia);[114] and the 1996 Immigration Amendments (eliminates review of narrow set of discretionary actions by Attorney General, not constitutional issues).[115]

Second, the Majority asserts the founders would have expressed support for court stripping legislation.[116] In this regard, the Majority notes that authority such as Hamilton's Federalist No. 80 make clear that Congress has broad authority to rein in the federal courts. Properly read, Federalist No. 80 merely restates the Constitution's grant of authority with regard to the federal courts generally. It does not sanction efforts to eviscerate and degrade the federal courts themselves as H.R. 2028 does. In reality, as noted above, Hamilton was one of the principal supporters of a strong and independent federal judiciary of broad jurisdiction.

CONCLUSION

Just as we opposed the ill-considered Marriage Protection Act, we oppose this court stripping bill. These efforts to deny our citizens access to the federal courts constitutes nothing more than a modern day version of "court packing." Just as President Franklin Roosevelt's efforts to control the outcome of the Supreme Court by packing it with loyalists was rejected by Congress in the 1930s, thereby preserving the independence of the federal judiciary, so too must this modern day effort to show the courts "who is boss" fail as well.

We agree with then-President George Washington's warning concerning efforts to undermine the judiciary, when he stated:

> Let there be no change [in court powers] by usurpation; for it is through this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil, any partial or transient benefit which the use can at any time yield.[117]

Justice Jackson echoed these warnings over sixty years ago in *Barnett*, a decision now under attack by this very legislation:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and official and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be sub-

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Disabled. It is only with respect to those particular factors that go into the calculation of the fee schedule, that the restriction applies. The restriction does not apply to the fee schedules themselves, much less to, as Ms. Schlafly put it, "administrative decisions about many aspects of the Medicare payment system."

[114] 442 U.S.C. 1973c places jurisdiction in the U.S. District Court for the District of Columbia, with a direct appeal to the Supreme Court. This was upheld by the Supreme Court in *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1966).

[115] The limitation of jurisdiction in the 1996 immigration law is quite specific and circumscribed. It only bars judicial review of three discrete and discretionary actions—the Attorney General's decisions (1) to "commence proceedings," (2) to "adjudicate cases," or (3) to "execute removal orders." See *Hatami* v. *Ridge,* 270 F. Supp. 2d 763 (E.D. Va. 2003).

[116] H.R. 2028 Markup (statement of Representative F. James Sensenbrenner).

[117] President George Washington, Farewell Address to the Nation (1796).

> mitted to vote; they depend on the outcome of no elections.[118]

It is unfortunate that the Judiciary Committee would disparage these eloquent statements by passing legislation such as the Pledge Protection Act and the Marriage Protection Act that are so totally inconsistent with judicial independence. With the passage of this legislation, parents will be stripped of their right to go to court and defend their children's religious liberty, schools could expel children for acting according to the dictates of their faith, and Congress will have slammed the courthouse doors shut in their faces. We urge the Members to put principle above politics and reject this ill-advised and unconstitutional legislation.

JOHN CONYERS, Jr.
HOWARD L. BERMAN.
JERROLD NADLER.
BOBBY SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
ROBERT WEXLER.
TAMMY BALDWIN.
ANTHONY D. WEINER.
LINDA T. SÁNCHEZ.

○

[118] 319 U.S. 624, 638 (1943).